

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Chapter 11
)	
UNR INDUSTRIES, INC.,)	82 B 9841-9845
UNARCO INDUSTRIES, INC.,)	82 B 9847
UNR, INC., UNR-ROHN, INC.)	82 B 9849 and
(Alabama), UNR-ROHN, INC.)	82 B 9851
(Indiana), JOBAL TUBE CO., INC.,)	
UNR PRODUCTS, INC., and)	
FOLDING CARRIER CORP.,)	
)	
Debtors.)	Honorable Erwin I. Katz

**ORDER DENYING MOTION OF CHARLES W. MURDOCK
FOR APPOINTMENT OF INDEPENDENT LEGAL COUNSEL
PURSUANT TO TRUST AGREEMENT**

THIS MATTER COMES before the Court on the Motion of Charles W. Murdock for Appointment of Independent Legal Counsel to determine his right to indemnification of attorney's fees under the UNR Trust Agreement. For the reasons stated below, IT IS HEREBY ORDERED THAT THE MOTION IS DENIED.

In September 1997, Charles W. Murdock ("Murdock"), a Trustee under the UNR Trust Agreement, filed an Application for an Order Construing the UNR Trust Agreement and Seeking Instructions from the Court Regarding Certain Alleged Conflicts of Interest and Breaches of Fiduciary Duties by the Board of Trustees of the UNR Trust. He then filed an Amended Application seeking

essentially the same relief. In the Amended Application, Murdock sought an order which: (1) required the Chairman of the Board of Trustees to comply with Trust policy and cease interfering in the business affairs of UNR corporation and the Board of Director's exercise of its fiduciary duties; (2) held that the conflicted Trustees could take no action regarding certain transactions on behalf of the Trust and lacked the ability to appoint a sole negotiator for those transactions; (3) declared that the Trustees' unanimous resolution to reduce the Board of Trustee membership from five to three was obtained through misrepresentation and omissions of material fact by the Chairman of the Board of Trustees; (4) determined that the Board of Trustees could not elect to reduce its size from five to three without court approval and that the majority of the Board of Trustees could not force a court-appointed Trustee to resign or could not remove such a trustee in an effort to reduce the Board membership; (5) restrained the Trustees from approving any slate of directors for the UNR Board of Directors other than the original directors appointed by this Court; and (6) an order removing the Chairman of the Board of Trustees.

At that time, the Board of Trustees of the UNR Trust consisted of John H. Laeri, Jr.; Michael E. Levine; David S. Shrager; James McMonagle and Charles W. Murdock. Mr. Laeri was the Chairman of the Board of Trustees at that time. Mr. McMonagle and Murdock were asked to resign from the Board of Trustees pursuant to the Board's decision to reduce its membership from five to three

members, and did so. Murdock was contesting this decision, among other things, in his Amended Application.

The Court conducted an extensive evidentiary hearing on this Amended Application. The Court noted that the “actions by Laeri and the other Trustees directed towards Murdock, a Trustee who voiced legitimate concerns, were not taken in good faith” and that “Laeri seems to have acted somewhat questionably, in seeming disregard of his fiduciary responsibilities.” Para. 92 and Conclusion, Memorandum Opinion dated December 10, 1997. The Court also found, however, that “the evidence does not show that Laeri exhibits a degree of control over the Trustees sufficient to render any request for relief before the Board to be a futile and useless act.” Para. 88, Memorandum Opinion. The Court ultimately found that “Murdock has filed the application at bar in bad faith.” Para. 59, Memorandum Opinion. “[B]y not challenging the activities of the Trustees before his failed election, Murdock has demonstrated that he has not brought his application for the purpose of benefitting the claimants, but rather to seek vindication from Laeri.” Para. 72, Memorandum Opinion. The relief requested was therefore denied.

On February 19, 1998, following this Court’s denial of the Amended Application, Murdock filed a motion for orders relating to Murdock’s attorneys fees and expenses incurred in bringing the Amended Application. In that motion for fees, Murdock requested the following relief: (1) an order determining whether

Murdock should apply for fees under Illinois trust law or should pursue his right to indemnification under the Trust Agreement; (2) if proceeding under Illinois law, an order setting a bifurcated evidentiary hearing to determine the right to reimbursement before determining the amount to be reimbursed; and (3) if proceeding under the Trust Agreement, an order appointing independent legal counsel to determine the right to indemnification.

On March 3, 1998, the Court held that Murdock's bad faith in bringing the Amended Application on behalf of the Trust precluded any indemnification award and denied the request for fees and expenses. Murdock appealed this oral ruling.

On October 8, 1998, the District Court reversed this Court's Order and remanded the matter back to this Court for further proceedings in accordance with the indemnification provisions of the Trust Agreement. The relevant provisions of this Trust Agreement provide in Section 5.06(a) that:

The Trustees shall be indemnified by the Trust, to the fullest extent that a corporation organized under Illinois law is from time to time entitled to indemnify its directors against any and all liabilities, expenses, claims, damages or losses incurred by them in the performance of their duties hereunder.

Section 5.06(b) provides that:

Any indemnification under Section 5.06(a) of this Agreement shall be made by the Trust upon a determination that indemnification of such Person is proper in the circumstances. Such determination shall be made by a majority vote of the Trustees who were not parties to such action, suit or proceeding, if at least two such Trustees were not parties; otherwise, the

determination shall be made by independent legal counsel ordered by the Court to make such determination.

Following the District Court's ruling, Murdock, through his counsel, sent a letter dated October 9, 1998 to the Trust's counsel which states:

"[W]e are happy just getting the indemnification procedure set forth in the agreement. . . I believe the only issue is the reasonableness of the fees and expenses. If that is the only issue, we should be able to resolve it. The Firm has about \$690,000 in time, disbursements, and charges in this matter. I would be pleased to apply a 10% discount . . . to our time, submit a demand for indemnification to the Trust, and have your D & O carrier put an end to this matter. Alternatively, we could agree on non-binding mediation and hear the arbitrator's recommendation. I would consider any process that settles this matter without either side incurring more fees and expenses. Let me know what you think."

Counsel for the UNR Trust responded by letter dated December 11, 1998 as follows:

"Pursuant to Section 5.06 of the Trust Agreement, the Trustees, with Jack Laeri abstaining, have considered your request that the Trust pay your firm \$660,000 for your firm's role in planning and prosecuting the application to perpetuate Charles W. "Bud" Murdock's position as a Trustee. As you know, under 5.06(a), indemnification is available to a Trustee only to the extent liabilities were incurred in the performance of his duties as trustee, and only to the extent indemnity would be authorized under similar circumstances for a director of an Illinois corporation. Bud has accepted that "good faith" is the standard for indemnification....The Trustees have again reviewed Bud's actions, the findings of the Court with respect to them, and the findings of their own investigation conducted after the application was denied. On the basis of that review, they cannot conclude either that the application was filed in good faith or that its prosecution was part of the performance of Bud's duties as a Trustee. Judge Katz's decision, from which no appeal was taken, specifically found that the action was brought in bad faith and the Trustees own investigation concluded that the allegations made by Bud were without any merit. Nothing positive was accomplished through Bud's application, nor have you even attempted to come forward with a showing that any portion of Bud's expenditures

conferred any benefit on the Trust. Accordingly, the Trustees have asked me to report that they do not see a basis for contribution to Bud's legal bills under Section 5.06(b)."

On December 23, 1998, subsequent to this exchange of letters, Murdock filed this instant Motion for Appointment of Independent Legal Counsel Under the Trust Agreement. In the motion, Murdock asserts that he is entitled to independent legal counsel to determine his indemnity rights because (1) all the trustees had an interest in the litigation; (2) Laeri, Shrager and Levine were essentially adverse parties in the litigation; and (3) the court treated them as de facto defendants in the proceeding. Thus, these Trustees would be disqualified under the Section 5.06(b) of the Trust Agreement from deciding the indemnification request and independent legal counsel must be appointed.

The UNR Trust objects to the appointment of independent legal counsel on the grounds that (1) Murdock requested indemnification in the October 9, 1998 letter and thus acknowledged that the Trustees were the proper persons under Section 5.06(b) to determine his right to indemnification; (2) Trustees Laeri, Shrager and Levine were not parties to the underlying litigation and thus they are not disqualified from deciding the indemnification request; (3) the Court has already determined that Murdock acted in bad faith and, since the Trust Agreement only allows indemnification for actions brought in good faith, there is no situation under which Murdock could prevail in his request.

In his reply brief, Murdock argues that he did not request that the Trust indemnify him in the October 9, 1998 letter and thus the Trustees had no right to make a decision on indemnification at that time. Murdock also argues that the Trust Agreement does not require a finding of good faith for indemnification of a Trustee and thus this Court's prior ruling would not in any way affect his right to indemnification. Furthermore, since the Trust Agreement expressly provides that the decision must be made by independent legal counsel, this Court has no authority to rule on an indemnification request through the application of its prior ruling or in any other manner.

Court hereby finds that the October 9, 1998 letter was not a request for indemnification pursuant to the Trust Agreement. Rather, it was merely an offer in settlement and a request to begin negotiations. This letter cannot be deemed a submission of Murdock's contractual indemnification rights to the Trustees for a binding decision. Nor can this letter be deemed a waiver of the indemnification process provided for in the Trust Agreement. It is merely a preliminary offer to negotiate and consider alternative resolution of a contingent claim. If the Trust decided not to enter into negotiations, then Murdock may proceed to exercise his contractual right to seek indemnification under the express terms of the Trust Agreement. Therefore, pursuant to Section 5.06(b) of the Trust Agreement, there were no grounds for the Trustees to determine Murdock's right to indemnification at the time of the letter. They cannot unilaterally deny a request which has not been made.

Thus, Murdock still has the right to request indemnification under the Trust Agreement. He has asked the Court to appoint an independent legal counsel pursuant to Section 5.06(b) to determine whether he is entitled to indemnification for his legal fees and expenses. Under the terms of Section 5.06(b), however, Murdock is entitled to the appointment of independent counsel only upon a finding that the Trustees are disqualified from hearing the request. If there are available at least two Trustees who were not parties to the underlying action, suit or proceeding, then the indemnification determination must be made by a majority vote of those Trustees.

The disqualification language under the Trust Agreement is expressly limited to cases where the Trustees are parties to the underlying litigation. It could easily have been extended to instances where there was an alleged conflict of interest or an allegation of bad faith or misconduct by the Trustees. It could have been phrased in terms of “opponents” rather than “parties” or extended to disqualify the Trustees when there was some perceived animosity or dislike of the person requesting indemnification. However, it was not. The Trust Agreement limited the disqualification terms to instances where the individual Trustees were named as parties.

In this case, the Trustees available to rule on a request for indemnification are Laeri, Shrager and Levine. These Trustees were not directly named as parties in the Murdock’s amended application for relief against the Trust. The

Amended Application did request (1) the removal of Laeri as Chairman of the Board of Trustees; (2) an order requiring the Chairman to comply with Trust Policy and to stop interfering with the UNR Board of Directors; (3) a finding that certain actions taken by the Trust through the Board of Trustees were invalid due to alleged conflicts of interest held by certain Trustees; and (4) an order limiting the Board of Trustees rights regarding the approval of a slate of candidates for the Board of Directors. Arguably, Laeri may be deemed a party since the Amended Application sought to have him removed from his position as Chairman. None of the other relief requested, however, was directed against the Trustees personally in their individual capacities. The Amended Application only sought relief against the Trust for its actions via the Board of Trustees.

Murdock argues that the Trustees were parties to the underlying litigation in that they had a right to control the proceedings even if they were not formally named as parties. Murdock claims that they were not named as parties because the relief requested was not available from them and they had already compelled the Trust to take the action complained of. Furthermore, Murdock argues that even if the Trustees were technically not parties to the underlying litigation, they had demonstrated animosity toward Murdock and had a self-interest in the outcome of the proceeding which would require them to abstain from any indemnification request. Thus they should be treated as parties even if they were not technically named as such.

The Court rejects these arguments. The individual Trustees Laeri, Shrager and Levine were not named as parties to the Amended Application. Furthermore, even assuming that Laeri was somehow a party due to the request to remove him as Chairman and to restrain him from interfering with the Board of Directors, there are still two additional Trustees, Shrager and Levine, against whom no relief was sought who cannot be deemed parties to the action. The Court expressly found in its ruling on the Amended Application that there was no evidence that Laeri controlled these Trustees to the point that they could not act independently of him. Thus, at least these two Trustees would be qualified to make the indemnification determination if and when such a request is properly submitted to them. Murdock has chosen not to avail himself of the remedy set forth in the Trust Agreement.

It is therefore ordered that Murdock is not entitled to have the request determined by independent legal counsel under Section 5.06(b) of the Trust Agreement because this provision only comes in to play when the Trustees are disqualified. Furthermore, because this Court finds that Murdock is not entitled to the appointment of independent legal counsel it need not address the Trust's assertion that this Court's earlier finding of bad faith would preclude an indemnification award by any entity, including an independent legal counsel.

This Court's order is limited to a denial of the request that it appoint independent legal counsel under Section 5.06(b) of the Trust Agreement. It is not in any way determining whether Murdock is entitled to indemnification under the Trust Agreement.

ENTERED:

Dated:

Honorable Erwin I. Katz
United States Bankruptcy Court